UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FRED I. MERRILL, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 88-0321 P*
	)	
THE TRAVELERS COMPANIES,	)	
	)	
Defendant	)	

ORDER ON DEFENDANT'S MOTION TO AMEND ANSWER AND RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the court are the defendant's Motion to Amend Answer and Motion for Reconsideration of the Defendant's Motion for Summary Judgment, both filed as a result of the recent decision of the Supreme Judicial Court of Maine in *Peerless Insurance Co. v. Brennon*, No. 5187 (Me. Sept. 6, 1989), overruling *Baybutt Construction Corp. v. Commercial Union Insurance Co.*, 455 A.2d 914 (Me. 1983). Specifically, the defendant seeks leave to amend its answer to add an affirmative defense[1] and the entry of summary judgment in its favor on the plaintiff's complaint, as prayed for in its original summary judgment motion. Critical to the defendant's position is its claim that the Law

[1] The proposed affirmative defense states:

> To the extent that the counterclaims allege a covered ``occurrence of harm," said occurrence involves property damage to work performed by or on behalf of the named insured and is, therefore, excluded by policy exclusion (o).

Court's abandonment of the rule fashioned in *Baybutt* now compels a different result from that embodied in this court's Order Affirming the Recommended Decision of the Magistrate.

I first address the motion to amend. The motion is unopposed and presents no new issues of fact. Rather, it simply formalizes a legal defense which has been lurking in the case from the outset and which now deserves fresh consideration in the wake of *Peerless*. In these circumstances and in recognition of the liberal amendment policy underlying Fed. R. Civ. P. 15(a), the motion to amend is ***GRANTED***.

In my original consideration of the parties' cross-motions for summary judgment, I concluded that the counterclaims in the underlying action disclosed a *potential* for liability within the coverage of the policy and that the defendant therefore owed the plaintiff a duty to defend against the counterclaims. My conclusion was based in part on the Law Court's holding in *Baybutt* that a comprehensive general liability insurance policy identical in all relevant respects to that at issue here covered breach of contractual warranties of the type alleged in the underlying counterclaims.

In *Peerless*, the Law Court abandoned the coverage analysis and conclusion contained in *Baybutt* in favor of the view that the language in policy exclusions (n) and (o) is unambiguous and the exclusions must therefore be interpreted ``according to their plain and commonly accepted meaning" which the court apprehended as follows:

> Exclusions (n) and (o) clearly and unequivocally preclude coverage for the business risk that the insured contractor's product or completed work prove to be unsatisfactory. If, as in the instant case, a contractor performs unsatisfactory work, repair or replacement of the faulty work is a business expense for which insurance coverage is not provided. Conversely, if the faulty work causes an accident resulting in physical damage to others, coverage is afforded and the exception to exclusion (a) preserves coverage even if the claim is based upon a quasi-contractual warranty theory.

Peerless, slip op. at pp. 8-9, quoting in part *Baybutt Construction Corp.*, 455 A.2d at 923 (Wathen, J. dissenting). In so doing, the court joined a number of other jurisdictions in recognizing both the distinction between an ``occurrence of harm risk" and a ``business risk" and the fact that the former is covered by the standard comprehensive general liability policy while the latter is specifically excluded.

The defendant argues that *Peerless* is determinative of this action and vindicates its refusal to assume the plaintiff's defense of the underlying counterclaims on the basis of its assertion that they involve ``business risk" rather than ``occurrence of harm risk" claims, that they contain no allegation of an occurrence of property damage or bodily injury as those terms are defined in the policy, and that, even if they could be read as alleging such an occurrence, exclusion (o) precludes coverage. The plaintiff contends that *Peerless* is not fatal to its cause and that all of the coverage elements necessary to an insurer's duty to defend remain present even post *Peerless*.

As the Law Court has recently reiterated:

> The scope of the duty to defend is determined by ``comparing the provisions of the insurance contract with the allegations in the underlying complaint. If there is *any* legal or factual basis that could be developed at trial, which would obligate the insurer to pay under the policy, the insured is entitled to a defense." *J.A.J., Inc. v. Aetna Casualty and Sur. Co.*, 529 A.2d 806, 808 (Me. 1987) (emphasis original), citing *American Policyholders' Ins. Co. v. Kyes*, 483 A.2d 337, 339 (Me. 1984). The scope of the duty does not depend merely on the draftsmanship of the complaint ``but on a *potential* shown in the complaint that the facts ultimately proved may come within the coverage." *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 226 (Me. 1980) (emphasis original).

Burns v. Middlesex Insurance Co., 558 A.2d 701, 702 (Me. 1989); *see also Lavoie v. Dorchester Mutual Fire Insurance Co.*, 560 A.2d 570, 571 (Me. 1989).

> ``Precision" is not required in a complaint, and is not necessary for determining a duty to defend. Rather, a duty to defend may arise from

> a ``broad, conclusory allegation, such as negligence, which does not include specific factual allegations." That the allegations need not include specific facts that are unequivocally within the coverage accords with the requirement of M.R.Civ.P. 8(a) -- that a plaintiff's complaint include ``a short and plain statement of the claim showing that the pleader is entitled to relief." Even a complaint which is legally insufficient to withstand a motion to dismiss gives rise to a duty to defend if it shows an intent to state a claim within the insurance coverage.

Lavoie, 560 A.2d at 571, quoting *Travelers Indemnity Co. v. Dingwell*, 414 A.2d at 225-26.

I conclude from a fresh comparison of the underlying counterclaims with the policy that the defendant owed the plaintiff a duty to defend, even in light of *Peerless*. In addition to a number of specific allegations, each of the counterclaims contains a general allegation of numerous unspecified defaults by the plaintiff of its construction subcontract obligations, as well as an allegation of significant but unspecified damages.[2] Under our system of notice pleading, these general allegations are sufficient to have allowed for the possible development at trial -- had there been a trial[3] -- of facts establishing that, as a consequence of the faulty performance by the plaintiff of its own work under its subcontract with the general contractor, it both breached it subcontract and damaged property other than its own work or product.

Although the Maine ``comparison test" does not permit the insurer or the court to look behind the allegations of the pleading in evaluating a duty to defend claim, *see Travelers Indemnity Co. v. Dingwell*, 414 A.2d at 227, certain of the detailed facts asserted by the plaintiff in its original memorandum as underlying, but which are not specifically contained in, the counterclaims nevertheless provide a useful illustration. *See* Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment and in Support of Plaintiff's Objection to Defendant's Motion for

[2] In addition, the general contractor's counterclaim alleges negligence.

[3] The underlying litigation was settled prior to trial.

Summary Judgment at p. 11. Thus, for example, the broad allegations of the counterclaims would have allowed for the development at trial of facts establishing that, in performing its construction and erection work under its subcontract, the plaintiff negligently excavated for footings and in doing so struck and damaged subsurface drains which were not part of its work or product. Such an act would have constituted faulty work causing an accident resulting in physical damage to property other than its own. There is, in short, a *potential* for liability within the coverage appearing from the general allegations of the counterclaims.

This conclusion is buttressed by the more specific allegations contained in the counterclaims. The owner's counterclaim alleges, *inter alia*, a failure to personally supervise stadium work on a regular basis and prevention of completion of work by the general contractor and other subcontractors. The general contractor's counterclaim alleges, *inter alia*, failure to adequately supervise the stadium work, failure to proceed in accordance with plans and specifications and failing to perform in accordance with reasonable standards of good workmanship. In addition, the general contractor's counterclaim alleges that all or some of the asserted contract breaches are the result of the plaintiff's negligence. Both allege specific damages which include general delays in the project and resulting financial loss. It is entirely consistent with the nature and scope of these specific allegations that they might well involve acts by the plaintiff constituting faulty work which caused one or more accidents resulting in physical damage to property belonging either to the owner, the general contractor or some other subcontractor and not within the scope of the plaintiff's own work. Such acts could have resulted from a failure by the plaintiff to have supervised its work or to have proceeded in accordance with plans and specifications or to have performed in accordance with reasonable standards of good workmanship, and could have prevented completion of work by the general contractor and other subcontractors leading to delays in the project and resulting financial loss. In short, the general tenor of the

counterclaims as gleaned from all of their allegations, including the specific enumerations of contract breaches and damages, evidences a potential for proof of related events which fall within the ``occurrence of harm risk" covered by the policy.

The defendant's assertion of the affirmative defense which is the subject of the allowed motion to amend adds nothing to the mix. That defense is necessarily predicated on the claim that any occurrence of harm alleged by the counterclaims involved only property damage to work performed by or on behalf of the plaintiff. As previously indicated, for purposes of Maine's ``comparison test" the counterclaims cannot be read so narrowly as to exclude the possibility of proof at trial of damage to property other than the plaintiff's own work or product. Indeed, this court has previously considered and rejected this defense in a context not dissimilar to that here. *Honeycomb Systems, Inc. v. Admiral Insurance Co.*, 567 F. Supp. 1400 (D. Me. 1983), involved as the insured the manufacturer of a large dryer which was incorporated into an even larger paper machine owned by another. Because of fabrication errors the dryer became damaged and the paper machine was consequently rendered useless for substantial periods of time while the dryer was being repaired. The insured sought coverage for certain losses it sustained when it was sued by the paper machine owner. The court entered a declaratory judgment on coverage in favor of the insured noting, *inter alia*, that, while the equivalent of exclusion (o) precluded coverage of property damage to the dryer because it was the insured's product, a significant element of damages sued on was for the loss of use of the paper machine, a product owned by another. *Id.* at 1408.

For the foregoing reasons, I recommend that the defendant's motion for reconsideration be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 18th day of October, 1989.

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David M. Cohen
United States Magistrate